

EXHIBIT

1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

1	SYNQOR, INC.,	*	CASE NO. 2:14-cv-286
2		*	
3	Plaintiff,	*	
4		*	
5	VS.	*	
6		*	
7	CISCO SYSTEMS, INC.,	*	Texarkana, Texas
8		*	November 5, 2015
9	Defendant.	*	10:01 a.m.

REPORTER'S TRANSCRIPT PRE-TRIAL CONFERENCE

VOLUME I (PAGES 1 - 209)

BEFORE THE HONORABLE CAROLINE M. CRAVEN

UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFF: (See sign-in sheets docketed with the
minutes of this hearing.)

FOR THE DEFENDANT: (See sign-in sheets docketed with the
minutes of this hearing.)

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(Proceedings recorded by mechanical stenography, transcript
produced on CAT system.)

1 purpose, so...

2 Okay. No. 7.

3 MR. HATCHER: All right. Your Honor, category No. 7
4 deals with the '021 patent. And more specifically, the
5 reexamination files for the '021 patent.

6 Again, the Court granted SynQor's MIL No. 3
7 precluding Cisco from introducing evidence, argument or
8 testimony relating to the validity of patent claims not
9 asserted at trial.

10 SynQor has narrowed its case by withdrawing the '021
11 claims.

12 THE COURT: Uh-huh.

13 MR. HATCHER: These claims are now non-asserted, so
14 they are covered by the ruling on MIL No. 3. Cisco, therefore,
15 cannot introduce evidence, argument or testimony regarding the
16 validity of those claims.

17 Now, Cisco's stated intent to maintain a DJ action on
18 the '021 claims does not change this result. SynQor is not
19 asserting these claims, so they are covered by the Court's
20 ruling on SynQor's MIL No. 3, which precludes Cisco from
21 introducing evidence, testimony or argument regarding the
22 validity of unasserted claims.

23 The Court's ruling on MIL No. 4 also applies. It
24 precludes Cisco from introducing evidence concerning the
25 reexaminations, quote, should willfulness not be an issue at

1 trial.

2 As to the '021 claims, willfulness is not an issue at
3 trial. SynQor is not asserting willfulness of any '021 claims
4 now.

5 Since willfulness is not at issue, the only purpose
6 in introducing the '021 reexam would be on the issue of
7 validity. But the '021 reexam is not final. And it is well
8 established that in progress reexams are more prejudicial than
9 probative and routinely excluded on that basis.

10 And we cited some examples of that in our argument
11 outlines, cases holding that in our argument outline, Your
12 Honor.

13 In particular, the differences between the burden of
14 proof can be confusing to a jury as reexams have a lower
15 standard of proof, preponderance of the evidence, than the jury
16 will be using here, clear and convincing evidence.

17 Now, Cisco argues that SynQor's narrowing of its
18 claims undermines the credibility of its infringement
19 allegations for the remaining claims.

20 That's simply not true, Your Honor. SynQor on
21 several occasions, including at Cisco's urging and the Court's
22 own orders on narrowing claims, has narrowed the claims as
23 we've gotten closer to trial in order to streamline. It
24 doesn't -- it doesn't undermine our credibility. That's --

25 THE COURT: Okay. Let me hear from Cisco real quick.

1 What is it -- what is it that you guys want to -- why do you
2 think this is relevant?

3 MR. TOMPROS: Your Honor, this is very important for
4 several reasons. First, we have a declaratory judgment claim
5 as to the invalidity and non-infringement of the '021 patent.
6 SynQor has not, at least not yet, given us a covenant not to
7 sue. And we're, therefore, entitled to pursue our
8 non-infringement and invalidity counterclaim in this case.

9 I think candidly, Your Honor, Mr. Hatcher may have
10 identified a -- a problem with the way that the Court's motion
11 in limine order is written, or at least the way that SynQor is
12 interpreting it.

13 Under the Court's motion in limine order, it is true
14 that the Court has said that Cisco cannot introduce evidence of
15 the invalidity of unasserted claims. But here we now have a
16 claim that we have a declaratory judgment counterclaim of
17 invalidity for. We clearly should be permitted to assert
18 invalidity of a claim for which we have a counterclaim of
19 invalidity.

20 And I would respectfully suggest that to the extent
21 that -- I think that SynQor is incorrectly interpreting it.
22 But to the extent that the Court's intent was that, that
23 motion's ruling should be reconsidered.

24 Then as to the '021 reexam more broadly, there is a
25 significant question here again because willfulness is in the

1 case still. And the Court has said that willfulness -- that
2 the reexams are admissible for willfulness.

3 To understand what going on here, I think the
4 timeline and the relationship between the patents matters. At
5 the time of the -497 case, which is when -- which is what
6 SynQor bases its willfulness claim on, all of the asserted
7 claims stood rejected in reexam. They were all rejected in
8 reexam.

9 Then there was a whole series of proceedings at the
10 Patent and Trademark Office where things got undone. The claim
11 that most recently that the Patent Trial and Appeal Board
12 issued a judgment on affirming the rejection of all claims was
13 the '021 patent. So that has been -- that was rejected.

14 Then the Court entered the motion in limine rulings
15 precluding reliance on reexams unless there was willfulness in
16 the case, which there is, and then precluding -- the rule on
17 validity of unasserted claims.

18 After that, two or three days ago, SynQor chose to
19 drop the '021 patent. And now says that because it has made
20 this choice in this paradigm, all the sudden that we can't rely
21 on this same reason.

22 THE COURT: Okay.

23 MR. TOMPROS: A key point here is that the '021
24 reexam, in that reexam itself, there were significant
25 statements both made by SynQor and made by the Patent Trial and

1 Appeal Board that affect the other claims.

2 And if I could just very briefly --

3 If we could put up DTX2231 at Page 16.

4 There's a -- right here, if we go to this Page 14.

5 Go two more pages down, sorry. Page 16 of the
6 internal brief. Almost there. Thank you.

7 This paragraph here beginning at the middle of the
8 page. If you blow up that bottom sentence it says: At no
9 point in the District Court CAFC or in -- sorry.

10 This is SynQor's statement to the Patent Trial and
11 Appeal Board: At no point in the District Court, Federal
12 Circuit, or in any related concurrent inter partes
13 reexamination proceeding has any entity or respondent attempted
14 to parse the secondary consideration evidence between or among
15 the five related patents.

16 So what happened in the '021 reexam was the Patent
17 Trial and Appeal Board said the secondary consideration
18 evidence -- considerations evidence invalidates all of the
19 claims. SynQor says at no point has that evidence ever been
20 any different among any of the patents.

21 At minimum, that is evidence that we were objectively
22 reasonable on the other patents and objectively reasonable in
23 our brief that they were invalid. So if objective
24 reasonableness for willfulness is going to the jury, this is
25 critical evidence of that objective reasonableness.

1 And then just to be clear, SynQor's other argument
2 about finality, is just wrong. This is a final judgment of the
3 Patent Trial and Appeal Board. It is a decision on appeal in
4 that case. It is true there are, you know, potential --

5 THE COURT: Okay.

6 MR. TOMPROS: -- for that, but it is final.

7 THE COURT: Thank you.

8 Briefly, Mr. Hatcher.

9 MR. HATCHER: Yes, Your Honor.

10 Your Honor, it's a non-final decision. It was a
11 decision by the PTAB, but there's a motion for reconsideration
12 filed and being -- and awaiting the PTAB's consideration. And
13 then after that, it still won't be a final decision. It will
14 be appealed to the Federal Circuit. We're years away from any
15 potential final decision in this particular reexam.

16 This is a perfect example of someone cherry-picking
17 quotes out from a brief out of context and arguing that they're
18 somehow relevant. It's a different burden of proof at the PTAB
19 compared to what the jury will consider. That's why Courts
20 traditionally and uniformly -- maybe not uniformly -- but often
21 exclude non-final reexams.

22 Here, these are now unasserted claims. The fact that
23 they want to bring in a DJ claim against unasserted claims just
24 shows that they're gaming the system in order to try to get
25 this material in for unasserted claims.

1 And -- and I would say, Your Honor, this is the first
2 time we heard from Mr. Tompros or anyone at Cisco that a
3 covenant not to sue might resolve this issue. It sounds like
4 if the parties can hash out --

5 THE COURT: I'm going to table this and let y'all
6 talk about it. I'll have something by the end of the day
7 unless I hear from you first.

8 Okay. No. 8. And we're just going to take up a
9 couple more, and then we're going to take a break and come back
10 and finish. We've got to talk about our afternoon.

11 Okay.

12 MR. HATCHER: Yes, Your Honor. MIT ownership
13 documents.

14 Here again, Cisco's story to this Court on relevance
15 is newly minted. Until now, Cisco only alleged the MIT
16 ownership documents were relevant to equitable defenses,
17 unclean hands specifically. And we submitted their
18 interrogatory response, which is their latest interrogatory
19 response.

20 And in that latest interrogatory response, the only
21 time they talk about the MIT ownership documents is in response
22 to a portion of an interrogatory addressing whether SynQor's
23 claims for relief in whole or in part are barred by the
24 doctrine of unclean hands.

25 The, quote, nature of invention that Cisco discusses

1 give everybody enough time? That's like 50 minutes. Does that
2 work?

3 MR. TOMPROS: Yes, Your Honor.

4 THE COURT: And I have a cake that someone gave us,
5 and I'm going to put it in a window out there. And it's
6 really, really good. And I apologize that we don't have any
7 forks, but we have spoons. So if you can't get away and you
8 want to work, you can have a sugar fix.

9 Okay. So we'll see you at -- what did I say, 20
10 after? No, 1:30. 1:30.

11 Okay. We're in recess.

12 COURT SECURITY OFFICER: All rise.

13 (Court in recess.)

14 COURT SECURITY OFFICER: All rise.

15 THE COURT: Please be seated.

16 All right. Are y'all ready?

17 Okay. Going back, I believe that we are now on
18 No. 12 of Plaintiff's objections.

19 MR. REIN: Your Honor, before we do that, can I
20 provide a quick report on the '021 reexaminations and the
21 discussions we had with Cisco on that?

22 THE COURT: Yes.

23 MR. REIN: So as Your Honor knows, Cisco has
24 indicated that it intends to proceed on its declaratory
25 judgment claim on the '021 patent to justify admitting the

1 reexamination on that patent. And we indicated that we are
2 willing to provide an appropriately narrow covenant not to sue
3 to moot the case in controversy under the '021 patent.

4 And they agree that that will -- that would indeed
5 moot the '021 patent from being asserted in front of the jury;
6 but nonetheless, they still want the reexamination of the '021
7 patent to come in and -- in evidence.

8 We will only provide a covenant not to sue if the
9 Court follows the motion in limine rulings that have already
10 been issued by this Court. And pursuant to that, the '021
11 reexaminations are kept out in accordance with those rulings.

12 Now, I suspect that Cisco will raise this issue with
13 Judge Schroeder if the -- if Your Honor's MIL rulings on this
14 remain as they are. And I suspect that if the MIL rulings are
15 altered, we will raise it with Judge Schroeder as well. And,
16 of course, any covenant not to sue would be contingent in our
17 view on the reexamination staying out.

18 So that's kind of where we are on the '021
19 reexamination issue. I thought it would save time not to go
20 into the -- rehashing the arguments as to why we think it ought
21 to be kept out and why they think it should come in.

22 THE COURT: Okay. Thank you very much, Mr. Rein.

23 MR. TOMPROS: I think, candidly, Your Honor, what
24 that means is that the decision on the '021 reexam really has
25 to be made on the merits. That the covenant to sue one way or

1 the other because of the contingency because of the rest of it,
2 it all -- it all hinges on the ruling. So Your Honor has the
3 issue.

4 I'm not sure that there's any way that the parties
5 can navigate through the admissibility of that reexam. Our
6 position continues to be that it's relevant to willfulness of
7 all the patents.

8 THE COURT: Even if the counterclaim issue is gone?

9 MR. TOMPROS: The answer is yes, Your Honor, for all
10 the reasons we've discussed before. The '021 reexam, because
11 as SynQor has said, all reexam secondary consideration evidence
12 is together and because this is part of the overall SynQor
13 portfolio that was asserted in the -497 case, which is the
14 basis for their willfulness claim, that it still should be
15 admissible again only if willfulness is in and only as a
16 response to the objective reasonableness of Cisco's willfulness
17 defenses.

18 So yes, we still contend that that is right. That's
19 why, unfortunately, the covenant doesn't -- there's no clean
20 way to navigate the covenant. We do agree, certainly, that if
21 we receive an appropriate covenant not to sue to satisfy the
22 requirements of the SuperSat case that we would not -- we'd be
23 precluded from bringing our counterclaims. And we understand
24 that. But I don't think that there's a way to navigate that
25 without the Court -- without the Court deciding the '021 motion

1 itself.

2 THE COURT: Okay. I'm going to take that under
3 advisement, and I'll come back with something after the next
4 break. I just want to do some thinking on that.

5 All right. Thanks for trying.

6 Okay. No. 12.

7 MR. HATCHER: Your Honor, Mike Hatcher again. Excuse
8 me.

9 Category No. 12, this is a single exhibit. It is an
10 e-mail, DTX322. Your Honor will note that there is a
11 settlement agreement, a final signed, executed settlement
12 agreement that has been agreed to be admitted between Fujitsu
13 and SynQor.

14 In the course of negotiating that settlement
15 agreement, there were some e-mail exchanges between SynQor and
16 Fujitsu. This is one of them. So this is a compromise
17 settlement communication. This isn't the actual final
18 settlement agreement. This is the back-and-forth trying to
19 reach agreement.

20 SynQor wants -- I'm sorry. Cisco wants to admit this
21 into evidence. It should be precluded under Rule 408 as a
22 statement made during compromise negotiations. Cisco, in
23 response -- there are some exceptions to that rule. Cisco does
24 not argue any of the exceptions in the response. Instead,
25 Cisco argues that Federal Rule of Evidence 408 would only

1 MR. TOMPROS: Your Honor, do you have a -- we're
2 proceeding from the Cisco objection brief document?

3 THE COURT: Yes, that's the one I've been looking at,
4 330. Does that work for y'all?

5 MR. TOMPROS: 330. That's great.

6 Thank you.

7 COURT SECURITY OFFICER: All rise.

8 (Court in recess.)

9 COURT SECURITY OFFICER: All rise.

10 THE COURT: Please be seated.

11 All right. Before we move on to Cisco's objections,
12 just to go back to No. 7. The Court, after much consideration,
13 is going to overrule SynQor's objection to No. 7, which is the
14 reexam, the '021 reexam.

15 That leaves only, I think, No. 5, which you guys were
16 going to do a little brief which explains or which puts where
17 the exhibits fall into certain parts of the timeline. And just
18 Monday or Tuesday if y'all can put that together. Unless you
19 can do it tonight, and we can talk about it tomorrow.

20 MR. HATCHER: Your Honor, I actually just reviewed
21 it, and it's going to be filed in a few minutes.

22 THE COURT: Okay. That was fast.

23 MR. DANFORD: We'll have to file our version of the
24 brief a little bit later than that.

25 THE COURT: Okay.

1 No. 1.

2 THE COURT: Go ahead.

3 MR. BURWELL: So Category No. 1 is a group of
4 exhibits that SynQor professes to offer from the -497 and -444
5 cases. SynQor says that these documents -- that they will not
6 offer these documents not to establish anything so as not to
7 contravene the Court's MIL order, but it will offer them for
8 willfulness.

9 But to the extent that SynQor believes that these
10 documents somehow establishes that Cisco willful infringed, you
11 must accept the proposition that the documents establishes
12 infringement or invalidity or the lack of non-infringing
13 alternatives, which is precisely what they're not allowed to do
14 under the Court's MIL order.

15 I would also add that none of these documents are
16 actually documents that demonstrate Cisco's awareness of
17 anything. They're Court files. They're orders. They are
18 statements from the -497 Defendants, which are hearsay. They
19 are their motions to stay an injunction. There's very little
20 from Cisco in here at all.

21 There's nothing in these documents that's necessary
22 to show any of the propositions for what SynQor offers them
23 for; including, for example, the denial of sur-petition at the
24 Supreme Court. There's no evidence that Cisco was ever aware
25 of that or what that is relevant to to anything in this case.

1 THE COURT: All right. Thank you.

2 MR. HATCHER: Your Honor, these are these orders --
3 these are orders from the -497 and I believe the -444 case,
4 such as the jury verdict form, the injunctions that were
5 entered in that case.

6 We'll state unequivocally that we're not going to
7 violate MIL 1. MIL 1 precludes us from arguing that the
8 findings or the conclusions from the prior litigations
9 establishes the following proposition: That SynQor's patents
10 are valid, that there --

11 THE COURT: Right.

12 MR. HATCHER: We're not going to argue the -497 jury
13 found the patents valid, therefore --

14 THE COURT: But you're saying you're going to use
15 them to prove up the number of old CPN units; is that right?

16 MR. HATCHER: First, they go to proving up the old
17 CPN units that were compensated. And they also do go to
18 willfulness, state of mind. Cisco has put its state of mind on
19 willfulness at issue.

20 Once it puts its state of mind at issue, we have to
21 consider everything it knew. And one of the things it knew is
22 that there had been a jury verdict finding that the patents
23 were valid.

24 We're not going to argue that that means that this
25 jury should therefore find that the -- that the patents are

1 valid. This jury is going to have to make that determination
2 itself. But Cisco wants to say that it didn't -- it's not a
3 willful infringer; that it didn't subjectively intend to
4 infringe. It can't on the one hand say that, and then preclude
5 us from presenting evidence showing -- that conflicts with the
6 very idea that's it's --

7 THE COURT: I can appreciate what you're trying to
8 do, but it's such a fine line that I don't think that you're
9 going to -- in effect, to make an in-run around that motion in
10 limine, so that's sustained.

11 MR. HATCHER: Well, Your Honor, when you say the
12 "motion in limine," I believe that their motion in limine on
13 this was denied.

14 THE COURT: I'm sorry.

15 No. I thought it was --

16 MR. HATCHER: Well, I mean, it does not preclude
17 either party from discussing that they establish them, but
18 we're not using them to establish.

19 And I also would say, Your Honor --

20 THE COURT: No, it was granted.

21 And yes, so that's my ruling.

22 MR. HATCHER: Okay. Yes, Your Honor.

23 THE COURT: It's sustained.

24 Okay. No. 2.

25 MR. DANFORD: Your Honor, category No. 2 is a

1 which is what I had intended to do, but I wanted to hear from
2 you on it.

3 I think that 25 has been withdrawn; is that correct?

4 MR. HATCHER: That's correct, Your Honor.

5 MR. TOMPROS: 26, I think the only remaining thing is
6 another hearsay issue which we would say is like the others?

7 THE COURT: Yes, like the others.

8 No. 27.

9 MR. BURWELL: No. 27, that's another series of
10 documents from the -497 case. These are pleadings that were
11 entered after the injunction trying to persuade the Court to
12 issue a stay. Several of these pleadings were issued not by
13 Cisco, but by the suppliers, and are therefore hearsay.

14 And our submission is that if the jury were to read
15 these documents, they would be confused and be persuaded to
16 take as a given that the patents are infringed and at the very
17 valid given the time period that these documents were entered
18 seeking an injunction.

19 THE COURT: Okay. Thank you.

20 How are you going to use them?

21 MR. HATCHER: Your Honor, these are -- the Cisco
22 briefs are admissions of a party opponent, and they're clearly
23 relevant to the issues. Even the -- even the briefs that are
24 from the -497 suppliers, these are the briefs when the -497
25 permanent injunction went up on appeal.

1 By that time, Cisco and the -497 suppliers -- most of
2 the -497 suppliers that were going up on appeal had reached
3 indemnity agreements. And agreements that weren't just
4 indemnity agreements, but required, Cisco required in these
5 agreements the -497 Defendants to prosecute this appeal and
6 other appeals however Cisco wanted.

7 So even the statements by the -497 Defendants are
8 statements of --

9 THE COURT: Okay. Are these pleadings that are in
10 the -497 injunction stay? Is that what I'm hearing about?

11 MR. HATCHER: Yes.

12 THE COURT: Okay. It does not sound like it for a
13 second. And tell me exactly what they are.

14 MR. HATCHER: So once the permanent junction issued,
15 there was a temporary stay issued by Judge Ward to allow the
16 -497 Defendants to file an emergency motion with the Federal
17 Circuit. They did, and Cisco filed an emergency motion to
18 intervene in that appeal of the permanent injunction. This is
19 all in January and early February of 2011.

20 THE COURT: And why are you wanting to admit them, to
21 prove what?

22 MR. HATCHER: There are statements in there that go
23 to damages, the calculation of damages and the -- and the
24 absence of non-infringing alternatives. There are absolute
25 statements in there about the absence of non-infringing

1 alternatives, and that there will not be non-infringing
2 alternatives until September of 2011 for -- for at least
3 certain of the products.

4 These are admissions of the party opponent, Your
5 Honor, that were on relevant issues that we're entitled to rely
6 upon.

7 THE COURT: Right. And so if somebody denied those
8 statements were made, then, I mean, it would be perfect for
9 impeachment. But I don't know that I can see it just being
10 trotted out with someone's testimony. I mean, are...

11 MR. HATCHER: Our experts rely upon them, Your Honor,
12 and they'll be able to put them forth.

13 THE COURT: Again, I'm not convinced about that. I'm
14 not sure. I'm concerned about the prejudicial impact of this.

15 Let me take 27 under advisement. I'm just bothered
16 by it.

17 Okay. No 28.

18 MR. DANFORD: If you could call up PTX980.

19 Your Honor, these are a set of the indemnity
20 agreements, these are the actual indemnity agreements that were
21 entered into between Cisco and the -497 Defendant suppliers
22 after the jury verdict in the -497 case.

23 And as I understand it, SynQor intends to offer these
24 as evidence of willfulness basically to suggest that Cisco
25 acted wrongfully by encouraging the suppliers to keep selling

1 Now, they say that the other products --

2 THE COURT: I'm going to -- I'm going to overrule the
3 objection --

4 MR. HATCHER: Thank you, Your Honor.

5 THE COURT: -- to 2161.

6 MR. HATCHER: I have nothing further on that then.

7 THE COURT: Okay.

8 I think that takes us to 65.

9 MR. TOMPROS: Your Honor, I think 65 is another
10 hearsay business record issue.

11 THE COURT: Okay.

12 MR. HATCHER: Yes. So it will rise and fall --

13 THE COURT: Okay. Does that take care of all of
14 Cisco's objections to SynQor's exhibits?

15 MR. TOMPROS: It does, Your Honor.

16 THE COURT: All right.

17 Well, here's what's going to happen next. This gets
18 really fun. You have the rulings on all but one, which I will
19 get to you on, which is No. 27. I want you to please take
20 these rulings -- and shortly, like in about five or ten
21 minutes, I'm going to come back out and tell you about the
22 witnesses so you can apply all of this to the objections to the
23 deposition designations.

24 We have tomorrow to go over those. I will tell you
25 that with the sheer number that I've seen so far, you know,

1 THE COURT: Please be seated.

2 Okay. Going back on the record.

3 The Court has decided that with regard to the
4 SynQor's objections to the ten witnesses that it believes were
5 identified, the Court is going to sustain that objection.

6 That's the good news for you.

7 The bad news is -- in all seriousness, I had left
8 No. 27, and the Court has looked at that and is going to
9 sustain Cisco's objection to that.

10 Okay. So do y'all have any questions about what it
11 is you're supposed to do between now and tomorrow?

12 MR. TOMPROS: Not from us, Your Honor.

13 THE COURT: So I need for y'all to have tomorrow
14 something for me to look at up here where I can also go
15 through. And really do apply the rulings that I made today to
16 what happened.

17 And if there are so many rulings having to do with
18 form of the question or responsiveness and that sort of thing,
19 objection, form, I mean, just all throughout the entire thing,
20 no. No, no. We're not going to deal with that.

21 Also, can we get started tomorrow at 9:30? Is that
22 too early or too late for anybody? And we will work hard to
23 get through it.

24 MR. TOMPROS: That's fine for us, Your Honor.

25 Just to clarify, do you want us to file something on